

## **PART 33 — PROTESTS, DISPUTES, AND APPEALS**

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#### SUBPART 33.1 — PROTESTS

##### 33.102 General.

(a)(1) Contracting Officers retain the inherent authority to resolve protests by taking corrective action. Contracting Officers may also communicate with the protester in an attempt to convince them to withdraw.

(2) All communication to the Office of the Chief Counsel shall be addressed to HQUSACE, (Attn: CECC-C).

(b)(2) In the event an agency protest is sustained, the protester shall be advised of its right to file a claim for costs to the Contracting Officer within 60 days after receipt of the agency's decision. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs. The Contracting Officer will evaluate the claim and submit to the Chief Counsel through channels, within 30 days, a recommendation as to payment of appropriate agency protest costs.

##### 33.102-100 Corps of Engineers Automated Legal System Matter Tracking System.

The field office attorney assigned to each agency or GAO bid protest shall ensure that the protest data is entered into the Corps of Engineers Automated Legal System-Matter Tracking System (CEALS-MTS) Procurement Bid Protest Notebook, as soon as practicable. The attorney is further responsible for promptly updating and ultimately closing the protest's MTS file, as appropriate.

##### 33.103 Protests to the agency.

(c) Where appropriate, alternative dispute resolution procedures may be used to resolve protests, as permitted by law.

##### 33.103(d)(3)-100 Authority.

(1)(i) The USACE agency protest process provides an independent review at a level above the Contracting Officer. Procedures for processing an agency protest are set out below. In response to each agency protest, the appropriate Contracting Officer shall submit an agency

protest report, with the analysis and documentation set forth in FAR 33.104(a)(3) and EFARS 33.190-102.

(ii) The Chief Counsel is authorized to decide all agency protests with power of delegation.

(2) The Chief Counsel has delegated the authority to decide agency-level protests to the following Division or Center Counsels: Great Lakes and Ohio River Division, Mississippi Valley Division, North Atlantic Division, Northwestern Division, South Atlantic Division, Southwestern Division, South Pacific Division, Pacific Ocean Division (only for Korea, Alaska, and Japan District procurements), Huntsville Engineering and Support Center, and the Transatlantic Programs Center. Such authority is without the power of redelegation except that Northwestern Division Counsel may redelegate to the Missouri River Region.

(3) The Chief Counsel has retained authority to decide agency-level protests in the Pacific Ocean Division (only for Honolulu District procurements), Humphreys Engineer Center Support Activity, and the Engineer Research and Development Center.

(4) Divisions, Regions, and Centers with delegated authority shall furnish copies of all final agency decisions to the Office of the Chief Counsel, within five days after the decision is signed.

(5) The Office of the Chief Counsel shall be advised of any protest of national significance or precedential nature. The Chief Counsel may choose to intervene in any case, to include removing the case from the general delegation. The Division, Regional, and Center Counsel have the discretionary authority to consult with the Office of the Chief Counsel in any protest as deemed necessary.

(6) In those cases in which the Chief Counsel has retained the authority to decide the agency bid protest, the District shall submit the Contracting Officer's report to the Division Counsel for review and comment. The Division Counsel then furnishes the report with comments to the Office of the Chief Counsel (attn: CECC-C) for final decision. Center Counsels shall submit the Contracting Officer's report directly to CECC-C for final decision. CECC-C requires two copies of the Contracting Officer's report be furnished.

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#### **33.103 (f) Action upon receipt of protest.**

(1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of a protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the government. Such justification or determination shall be approved by the Head of the Contracting Activity on a non-delegable basis.

(3) Upon receipt of a protest within 10 days after contract award or within five days after a debriefing date offered to the protester under a timely debriefing request in accordance with FAR 15.505 or 15.506, whichever is later, the Contracting Officer shall immediately suspend performance pending resolution of the protest within the agency, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved by the Head of the Contracting Activity on a non-delegable basis.

#### **33.103-90-100 Annual Agency Bid Protest Report.**

A year-end report of all agency and GAO bid protest cases decided during the fiscal year shall be submitted to the Office of the Chief Counsel by each Division and Center Counsel. Such report should include a summary and analysis identifying the number of protests by District, types of decisions, repetitive issues, trends, and any emerging guidance or patterns of decisions. The year-end report shall be submitted, no later than 15 October, to:

U.S. ARMY CORPS OF ENGINEERS, ATTN:  
CECC-C  
20 MASSACHUSETTS AVENUE N.W.  
WASHINGTON, D.C. 20314-1000

#### **33.103-100 Disclosure of Government Estimate**

If an apparent low bidder protests the reasonableness of the Government estimate, the Command shall provide the details of the Government estimate to the protester upon receipt of complete details of the protester's estimate. The details of the Government and

protester's estimates are not to be disclosed to third parties.

#### **33.104 Protests to GAO.**

33.104-100 (a) General Procedures. The Chief Counsel has the authority to determine the final agency position for GAO protests with power of delegation.

(1) The Chief Counsel has delegated authority to determine the final agency position for GAO protests to the following Division or Center Counsels: Great Lakes and Ohio River Division, North Atlantic Division, Northwestern Division, South Atlantic Division, South Pacific Division, Southwestern Division, Engineer Research and Development Center, Transatlantic Programs Center, and Huntsville Engineering and Support Center. Such authority includes the power for Division or Center Counsel to redelegate to the Districts and/or Region. Delegated protests shall be processed in accordance with procedures established by the respective Division or Center Counsels.

(i) Offices with delegated authority must furnish copies of all final agency positions (excluding exhibits) to the Office of the Chief Counsel, as soon as practicable after the position is signed. At the discretion of the Chief Counsel, draft copies may be requested for review prior to transmission to GAO.

(ii) Final agency positions include the agency report and agency response to protester comments, as well as any other dispositive motion submitted by the agency.

(iii) Division Counsels who have redelegated their authority should determine oversight requirements and issue policies to effect those requirements.

(2) The Chief Counsel has retained authority to determine the final agency position for GAO bid protests in the Mississippi Valley Division, Humphreys Engineer Center Support Activity, and Pacific Ocean Division. Counsel at such offices shall forward the Contracting Officer's report directly to the Office of the Chief Counsel within 15 days of the telephone notification, for determination of the final agency position on the protest. A copy shall be simultaneously

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sent to the Division Counsel for review and comment. Each Contracting Officer's report submitted shall include the analysis and documentation set forth in 33.190-100.

(3) The Office of the Chief Counsel shall be advised of any protest of national significance or precedential nature. The Chief Counsel may choose to intervene in any case, to include removing the case from the general delegation. The Division, Regional, and Center Counsel have the discretionary authority to consult with the Office of the Chief Counsel in any protest as deemed necessary.

(4) Immediately after receipt of a complete copy of the protest, counsel assigned to the case should consider whether a request for summary dismissal is appropriate. If summary dismissal of the protest or certain grounds of the protest is warranted, a request must be submitted to the GAO within three days.

(i) The written request should clearly indicate the protest number, the grounds of the protest that should be dismissed, and the reasons for dismissal. The request should also assert the Corps' intent to submit a full agency report within the normal deadline in the event the GAO declines to summarily dismiss the protest.

(ii) Counsel who have been delegated bid protest authority should contact the GAO Administrative Office by telephone to inform them that a request for summary dismissal is being prepared. Subsequently, the request and supporting documents should be faxed and mailed to the GAO attorney assigned to the case.

(iii) Counsel who have not been delegated bid protest authority should communicate to the attorney in CECC-C assigned to the protest that a summary dismissal is appropriate. Supporting documents for justification of the summary dismissal request should be faxed, or transmitted electronically as appropriate, to Office of the Chief Counsel, as needed.

(5)(i) Each office of counsel responsible for responding to protests at the GAO must fax a written notice of appearance to the GAO, protester, CECC-C, and intervenor if any, not later than three days after

being notified of the protest by the Office of the Chief Counsel.

(ii) The notice shall include the name, address, phone number, facsimile number, and e-mail address of the attorney who will represent USACE in the protest.

33.104 (b)(1) Protests before award. All requests to the Office of the Deputy Assistant Secretary of the Army (Procurement) (SAAL-PS) for approval to award a contract or issue a notice to proceed, notwithstanding a protest, shall be forwarded through channels to the Chief Counsel for processing and transmittal to SAAL-PS. Generally such request shall be forwarded to the Chief Counsel within three days of notice of the protest. The request shall include a complete explanation for the need to award or proceed with performance of the contract, including costs and other impacts, and the Contracting Officer's report with the analysis and documentation set forth in FAR 33.104(a)(3).

(c)(2) Protests after award. The findings for authorization of contract performance should be processed in accordance with the requirements provided at 33.104 (b)(1), Protests before award.

#### **33.190-100 Reporting and analysis of bid protests.**

##### **33.190-101 Bid protest after action report.**

The requirement for after action reporting will be satisfied by entering the required data in the CEALS-MTS Bid Protest Notebook, described in 33.102-100, as soon as practicable. GAO bid protest decisions are posted on the Internet within 24 hours after they are issued (unless subject to protective order), at: <http://www.gao.gov/decisions/bidpro/bidpro.htm>

##### **33.190-102 Contracting officer's reports on GAO and agency protests.**

(a) In addition to the documents described in FAR 33.103(d) and 33.104(a)(3), each Contracting Officer's report on an agency or GAO protest shall include:

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(1) Findings of fact prepared with complete documentation and including all the facts, both favorable and unfavorable, to the Contracting Officer's position.

(2) Review by legal counsel with citation to pertinent decisions of the Comptroller General.

(b) The Contracting Officer's report shall not be released to any member of the public, including the protestor and other interested parties, without the prior approval of the office having authority to decide an agency protest or to determine the final agency position on a GAO protest.

(c) Administrative report.

(1) The administrative report prepared in response to a protest should include, at a minimum:

(i) The Contracting Officer's signed statement of relevant facts;

- (ii) the protest itself;
- (iii) the solicitation;
- (iv) the protester's bid or proposal;
- (v) the successful bid or proposal;
- (vi) an abstract of bids;
- (vii) all evaluation documents;
- (viii) any other relevant documents; and
- (ix) an index to all documents submitted.

(2) The administrative report should be assembled in a secure binder fastened at the left side with a fastener that will permit the full page to be read. The index of all documents should be placed as the first page. Each document should be separated by a divider with a tab attached. The Contracting Officer's statement should be paginated. Sizable files should be divided into two or more volumes. The cover of the report should identify it as the protest file and include the file number. Drawings should be folded and placed into an envelope in the binder. The solicitation/contract should be enclosed as a separate exhibit if it is voluminous in size.

#### **33.203-100 Agency board of contract appeals for civil works contracts.**

For civil works contracts only, the Corps of Engineering Board of Contract Appeals, Pulaski Building, 20 Massachusetts Ave., N.W., Washington, D.C. 20314, is the agency board having jurisdiction over claims and appeals arising from final decisions of the contracting officer. The Armed Services Board of Contract Appeals shall have jurisdiction over non-civil works contracts.

### SUBPART 33.2 — DISPUTES AND APPEALS

#### **33.203 Applicability.**